TIMOTHY BECKWITH
(CONTESTED)

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The Lincoln Grandchildren

Timothy Beckwith

Excerpts from newspapers and other sources

From the files of the

Lincoln Financial Foundation Collection

THE
VIRGINIA GAZETTE.
Containing the freſheſt Advices, Foreign and Domeſtick.
FRIDAY, JULY 25, 1969 WILLIAMSBURG, VIRGINIA 3-A

Lincoln's Great-Great Grandchild Involved In Paternity Suit Here

When Timothy Lincoln Beckwith was born in Williamsburg's Community Hospital Oct. 14, 1968, he was only another new baby to the staff and to the town.

In fact, he was Abraham Lincoln's only living great-great-grandchild. Timothy is the son of Robert T. L. Beckwith of Middlesex County, Va. and his young wife, Annemarie Hoffman Beckwith.

Timothy, now nine months old, is in Germany with his mother, who is now separated from Beckwith. The infant is the center of a local lawsuit involving his paternity — and a trust valued at about $3,000,000.

In an unusual action filed by Robert Beckwith's attorney and trustee, Norman B. Frost of Washington, it is charged that Robert Beckwith was sterile during his marriage to Annemarie Hoffman Beckwith, and that he is not Timothy's father.

The Beckwiths were married in Middlesex County in November, 1967, and at the time of Timothy's birth last October, the mother was living in the Heritage Inn Apartments in Williamsburg.

The suit seeks a declaratory judgment establishing that Beckwith is not Timothy's father, and the plaintiff requested that a guardian be appointed for the infant, that blood tests be made, and that Judge Robert Armistead declare the rights of Timothy and three institutions who share rights in the trust with him. (These are the First Church of Christ, Scientist, of Boston; the American National Red Cross; and Iowa Wesleyan College of Mount Pleasant, Iowa).

Vernon Geddy, Jr. and Channing Hall, Williamsburg attorneys, have been named guardians and lawyers for Timothy, but the suit, though filed last autumn, is progressing leisurely, if at all. A thick package of depositions, reportedly from physicians, is in the Clerk of Court's file on the case, but there have been no recent moves by the plaintiff.

No trial date has been set in the matter.

Robert Beckwith, whose home is Woodstock Farm, Hartfield, Middlesex County, is said to have been living outside Virginia in recent months, and has not been available for depositions. Despite his intimate involvement, Beckwith is not a party to the suit.

The trust in which Timothy may share some day was established by Mary Harlan Lincoln, the wife of Abraham's son, Robert Todd Lincoln. Robert T. L. Beckwith, as her grandson, has a lifetime share in the trust, and the three institutions named will eventually receive shares of the residue of the trust.

In his deposition, the plaintiff Frost alleged that Mrs. Beckwith conceded that Robert Beckwith was not the father of the child, but said she declined to name the actual father.

Meanwhile, the nine-month-old Timothy, evidently healthy and happy in his mother's native Germany, is as blissfully unaware of the bizarre controversy as Williamsburg was of his arrival last October.

Until Frost presses his suit — and wins — the Williamsburg-born Timothy remains an heir to a historic heritage, and to a fortune as well.

PAUL K. LUCEY
SPECIAL REPRESENTATIVE
ROY F. MITTE & ASSOCIATES
PHONES: BUS. 838-1394 877-7690
RES. 826-6575

Its name indicates its character

2017 CUNNINGHAM DRIVE
RIVERDALE PLAZA
HAMPTON, VIRGINIA 23366

The Lincoln National Life Insurance Company

August 1, 1969

The Lincoln National Life Foundation, Inc.
The Lincoln Library and Museum
Fort Wayne, Indiana 46801

Gentlemen:

Several days ago I ran across a very interesting article concerning the great-great grandchild of Abraham Lincoln, the son of one Robert T. L. Beckwith of Middlesex County, Va.

At the moment it struck me that perhaps you might be interested in this article for the library.

Please use it if you can.

Cordially yours,

Paul K. Lucey

Hampton Office
(Lucey)

August 4, 1969

Mr. Paul K. Lucey
The Lincoln National Life Insurance Company
2017 Cunningham Drive
Riverdale Plaza
Hampton, Virginia 23366

Dear Mr. Lucey:

Many thanks for sending the newspaper clipping titled "Lincoln's Great-Great Grandchild Involved in Paternity Suit Here." I read it with interest.

I have been hearing rumors that Robert Lincoln Beckwith's young German student wife was pregnant. I have been wondering when the story would reach the papers. I did not expect a law suit so soon.

Yours sincerely,

R. Gerald McMurtry

RGM/cvrw

Chicago News April 3, 1976

Is he Abe's great-great-grandson?

Boy, 7, pawn in Lincoln fight

WASHINGTON (AP) — A District of Columbia appeals court has ordered that a blood test be conducted on a 7-year-old boy living in West Berlin in an effort to determine if he is the only great-great-grandchild of Abraham Lincoln.

The boy would be in line to inherit a Lincoln family trust fund estimated at "well over a million dollars" if it can be proved he is the descendant of the 16th President.

The District of Columbia Court of Appeals issued the order for the blood test in a divorce case involving Robert Todd Lincoln Beckwith, 71, of Washington, the last surviving great-grandchild of Lincoln, and his wife, Annemarie Hoffman Beckwith, 27, a native of West Germany.

MRS. BECKWITH gave birth to Timothy Lincoln Beckwith in Williamsburg, Va., on Oct. 14, 1968. In a divorce action filed in D.C. Superior Court, Beckwith charged his wife with adultery and contended he did not father the boy.

Mrs. Beckwith and the child now live in West Berlin.

Beckwith is the sole beneficiary of a trust fund established by the will of his grandmother, Mary Harlan Lincoln, who was the wife of the President's son, Robert Todd Lincoln.

Beckwith's attorney, Elizabeth R. Young, said the trust had assets valued at $1 million when Mary Harlan Lincoln died in 1973. "It certainly has not decreased in value since," she said. "It's worth well over a million dollars."

ACCORDING to Mary Harlan Lincoln's will on file in Superior Court, the trust fund would be divided among three institutions if Beckwith had no child when he died.

The appeals court order stated that any conclusion drawn from blood tests in the divorce case would not apply to the question of who benefits from the trust, but only as to the outcome of the divorce action.

Mrs. Beckwith has countersued for divorce, accusing her husband of adultery.

According to court records, she admitted that she "executed a document purporting to state that" Beckwith "was not the father of the child," but claimed that the document "was obtained by fraud and duress."

SUPERIOR Court Judge Joseph M. F. Ryan Jr. ordered on March 10, 1975, that she be given $1,000 for travel expenses and $3,000 for attorney fees on the condition that blood tests be conducted in Germany and sent to Washington.

Mrs. Beckwith then asked the appeals court to strike down the requirement of the blood tests. It refused to do so.

Washington Star Saturday, April 3, 1976

Lincoln

Blood Tests Ordered for 8-Year-Old Boy

Descendancy at Stake in Adultery Trial

By Kenneth Walker
Washington Star Staff Writer

The identity of Abraham Lincoln's last living descendant will be decided on the basis of a blood test.

That was the effect of a ruling yesterday by the D.C. Court of Appeals, which ordered that blood tests be run on an 8-year-old boy born to a German woman who was married to Robert T.L. Beckwith, Lincoln's sole survivor, at the time of the child's birth.

In an opinion written by Superior Court Judge Dwyer Justice Taylor, the three-judge panel ordered that the blood be drawn in West Berlin, where the boy, Timothy Lincoln Beckwith, lives with his mother, and that the samples be flown to a Northwest Washington laboratory for evaluation.

The appeals court ruling is part of a divorce proceeding in which Beckwith, a 72-year-old retired lawyer, and his estranged wife, 35-year-old Annemarie Hoffman Beckwith, are suing each other for absolute divorce on the grounds of adultery.

BECKWITH requested that the blood tests be ordered to prove he was not the father of the child. Mrs. Beckwith opposed the order, claiming it violated the boy's right to privacy.

"The probative value of blood tests in determining paternity is great," the appeals court ruled, rejecting Mrs. Beckwith's claims. "The extent of intrusion is minor. Blood tests are routine in our everyday life, encountered in applying for marriage licenses, going into the military and entering college."

The court also ordered Beckwith to pay travel and legal expenses for his wife to come to the United States for similar blood tests and to consult with her attorney. She said in court papers that she was without income.

Because the issue of Timothy's paternity will be decided in the case only for the purpose of granting or denying the divorce on grounds of adultery, the boy's right to inherit any of the substantial Lincoln estate would have to be determined in a separate legal proceeding, the appeals court ordered.

BECKWITH, a grandson of Robert Todd Lincoln, the only child of the Civil War president to reach maturity, filed a divorce complaint in Superior Court in 1973 — six years after his marriage in Hartfield, Va., to Annemarie Hoffman.

Beckwith married Ms. Hoffman three years after the death of his wife of 30 years, the former Hazel Holland. There were no children from the first marriage, according to Beckwith's attorney, Elizabeth Young.

Beckwith claimed in court papers that during the week he lived in the District, while his wife lived in a Williamsburg, Va., motel so she could attend classes at William and Mary College, where she was enrolled. The couple spent their weekends together at Woodstock, the Lincoln estate in Middlesex County, according to Beckwith's briefs.

See LINCOLN, A-7

LINCOLN

Continued From A-1

Beckwith said he learned of his wife's pregnancy in May 1968 after reading a medical statement mailed to his wife at the farm.

The boy was born on Oct. 14, 1968, in a southern Virginia hospital.

MRS. BECKWITH signed an affidavit, which she subsequently repudiated, stating that her husband was not the father of the child.

In an amended counterclaim for an absolute divorce on the grounds of absolute cruelty filed in February 1975, Mrs. Beckwith charged that her husband "deserted" her in September 1968, and that he "changed the locks of the family farm and locked her out."

The affidavit stating Beckwith was not the child's father was signed "under duress and by fraud" after he made the document a condition of her receiving any money for the medical bills, the woman said in court papers.

Mrs. Beckwith's attorney, Thomas Pennfield Jackson, also accused her husband of committing adultery "at the farm and at several other locations," with a Chevy Chase woman.

BECKWITH "destroyed" his wife's happiness, according to the brief, and "rendered her life so miserable and unendurable as to force" the woman to return to her family in Germany.

The appeals court noted that the reason for the three-year delay in adjudicating the divorce issue was the result of "the wife's efforts to assure that the outcome of this proceeding will not affect adversely her child's right, through her husband, to inherit under the Mary Harland Lincoln Testamentary Trust," which was established by Lincoln's son.

In the event of the sole survivor's death, the trust provides that the estate be divided equally between the First Church of Christ Scientist, in Boston, the American National Red Cross and Iowa Wesleyan College.

Blood test to decide if boy is Lincoln heir

Washington Post Service

WASHINGTON — A blood test will be conducted on a 7-year-old boy now living in West Berlin in an effort to determine whether he is the only great-great-grandchild of Abraham Lincoln.

If his lineage can be proven, the youngster would be in line to become the sole beneficiary of a Lincoln family trust fund estimated to be worth "well over" $1 million.

The order for the blood test was issued Thursday by the D.C. Court of Appeals.It came in a divorce case involving Robert Todd Lincoln Beckwith, a 71-year-old Washingtonian and the last surviving great-grandchild of the 16th President, and Annemarie Hoffman Beckwith, his 27-year-old wife, who is a native of West Germany.

Mrs. Beckwith gave birth to Timothy Lincoln Beckwith in Williamsburg, Va., on Oct. 14, 1968. In a divorce action filed in D.C. Superior Court Beckwith charged his wife with adultery and contended that he did not father the boy.

Mrs. Beckwith now lives with the child in West Berlin.

Beckwith currently is the sole beneficiary of a trust fund established by the will of his grandmother, Mary Harlan Lincoln. Mrs. Lincoln, a daughter-in-law of President Lincoln (she was the wife of the President's son, Robert Todd Lincoln), died in her Washington home in 1937.

Beckwith is the son of Warren Beckwith and the late Jessie Harlan Lincoln, who was a daughter of Mary Harlan Lincoln.

Robert Beckwith's lawyer, Elizabeth R. Young, said the trust had assets valued at $1 million when Mary Harlan Lincoln died.

"It certainly has not decreased in value since," the lawyer said. "It's worth well over a million dollars."

If Beckwith has no child when he dies, the trust fund would be divided among three institutions, according to the will of Mary Harlan Lincoln that is on file in Superior Court. The institutions are the First Church of Christ Scientist in Boston, the American National Red Cross and Ira Wealeyan College.

The appeals court, in its order, said that any conclusion drawn from blood tests in the divorce case would not apply to the question of who benefits from the trust, but only as to the outcome of the divorce action.

"... The child," the court stated in an opinion, "will be bound by a decision in the instant case" that Beckwith "is not his father. Although couched in terms of legitimacy, such a decision must be carefully distinguished from a decision on the issue of legitimacy ... for purposes other than proving adultery."

This means that any challenge to the boy's right to benefit from the trust fund would become the subject of a separate court action.

on the record

[illegible] Lincoln's Son Kin

By Stephen Green
Washington Post Staff Writer

A blood test will be conducted on a 7-year-old boy now living in West Berlin in an effort to determine whether he is the only great-great-grandchild of Abraham Lincoln.

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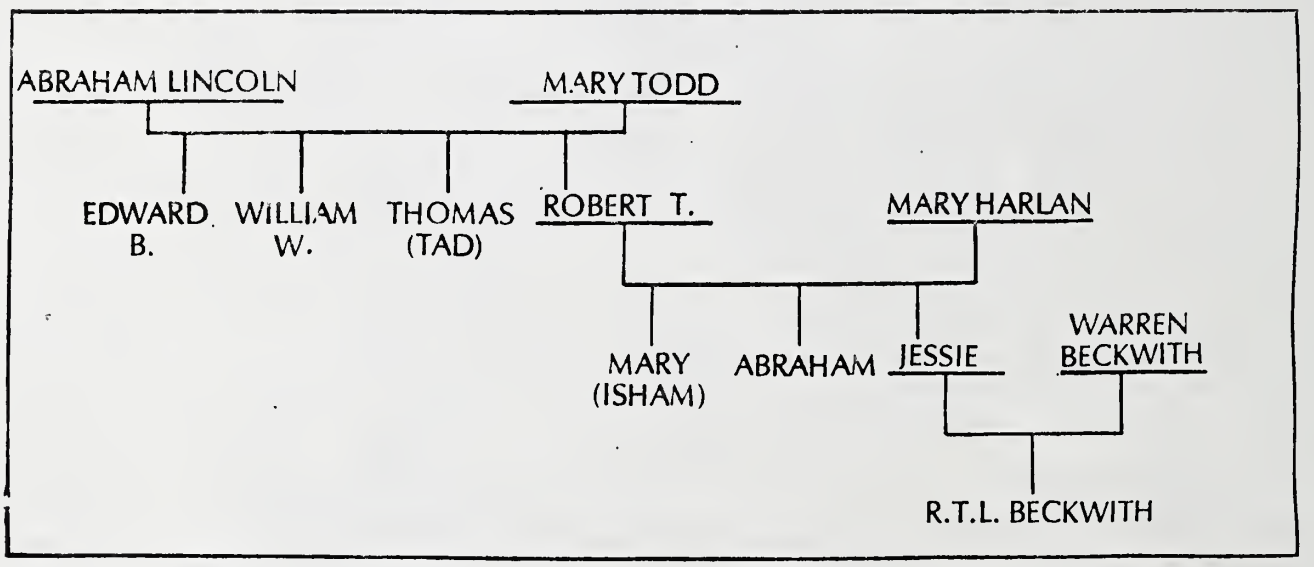
Mrs. Beckwith gave birth to Timothy Lincoln Beckwith in Williamsburg, Va., on Oct. 14, 1968. In a divorce action filed in D.C. Superior Court, Beckwith charged his wife with adultery and contended that he did not father the boy.

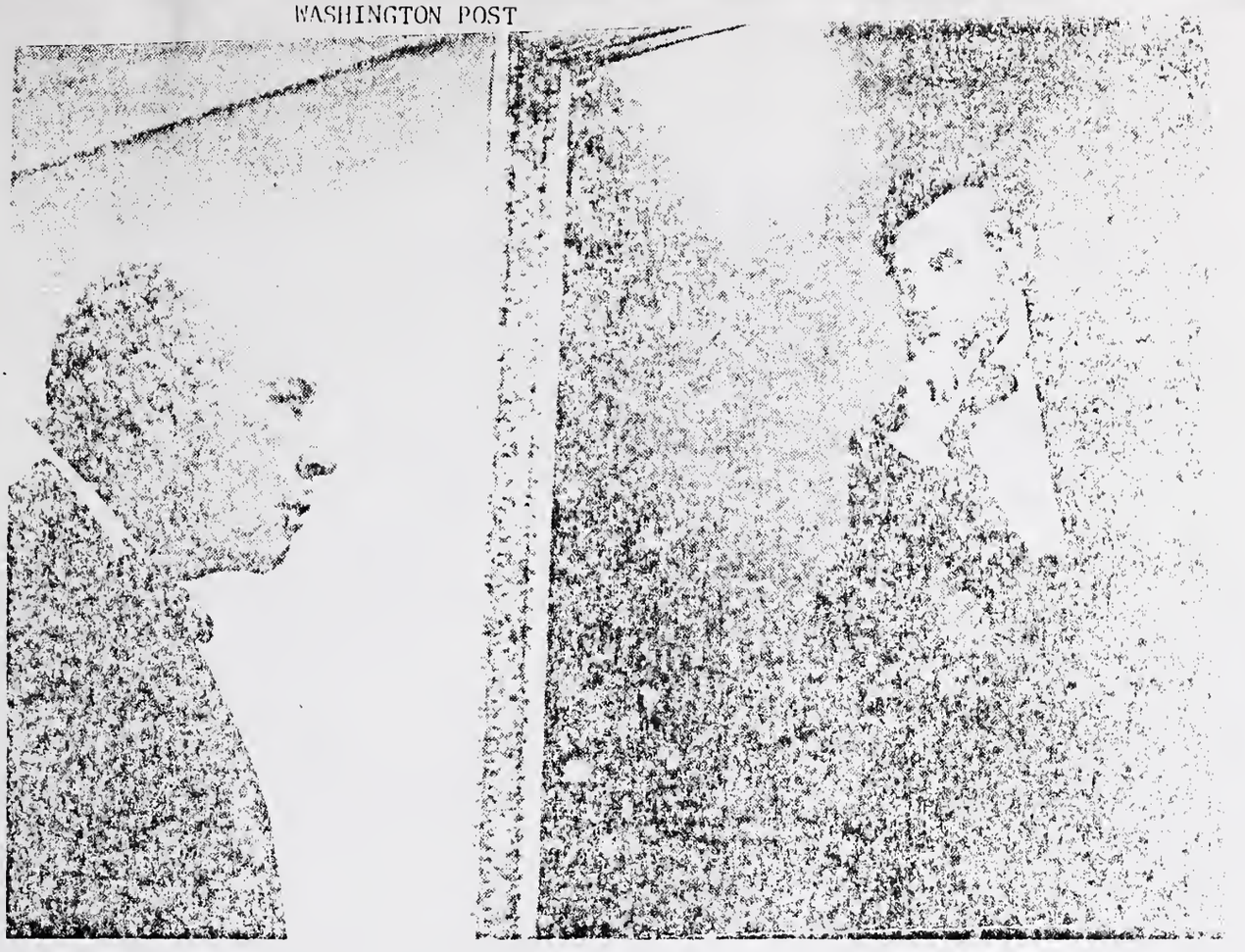
Mrs. Beckwith now lives with the child in West Berlin.

Beckwith currently is the sole beneficiary of a trust fund established by the will of his grandmother, Mary Harlan Lincoln. Mrs. Lincoln, a daughter-in-law of President Lincoln (she was the wife of the President's son, Robert Todd Lincoln), died in her Georgetown home in 1937.

See **LINCOLN, A7, Col.1**



WASHINGTON POST



By Frank Johnston—The Washington Post

Robert Todd Lincoln Beckwith—the great-grandson of Lincoln—with Healy painting at the National Portrait Gallery.

Blood Test to Decide Lincoln Heir Case

LINCOLN, From A1

Beckwith, who could not be reached for comment, is the son of Warren Beckwith and the late Jessie Harlan Lincoln, who was a daughter of Mary Harlan Lincoln.

His attorney, Elizabeth R. Young, said the trust had assets valued at $1 million when Mary Harlan Lincoln died.

"It certainly has not decreased in value since," the attorney said. "It's worth well over a million dollars."

If Beckwith has no child when he dies, the trust fund would be divided among three institutions, according to the will of Mary Harlan Lincoln, which is on file in Superior Court. These are the First Church of Christ Scientist in Boston, the American National Red Cross and Ira Wesleyan College.

The Appeals Court, in its order, said that any conclusion drawn from blood tests in the divorce case would not apply to the question of who benefits from the trust, but only as to the outcome of the divorce action.

". . . The child," the court stated in an opinion, "will be bound by a decision in the instant case that" Beckwith "is not his father. Although couched in terms of legitimacy, such a decision must be carefully distinguished from a decision on the issue of legitimacy . . . for purposes other than proving adultery."

This means that any challenge to the boy's right to benefit from the trust fund would become the subject of a separate court action.

According to court records, Beckwith maintains a residence at 4400 Connecticut Ave. NW and lives as a "gentleman farmer of independent means" on Woodstock Farm in Middlesex County, Va.

The records list him as a member of the Masons, Potomac River Power Squadron, Sons of Union Veterans of the Civil War, Corinthian Yacht Club of D.C., the University Club and Columbia Country Club of Chevy Chase.

Several years after she came to the United States from West Germany, Annemarie Hoffman, according to the records, married Beckwith on Nov. 6, 1967.

Following the marriage, the records state, they lived together on the farm until she "enrolled in William and Mary College, Williamsburg during the week, returning to her husband's farm on weekends."

On Oct. 30, 1973, Beckwith filed for divorce charging in court documents that his wife committed adultery and that she "admitted that he (Beckwith) is not the father of the child but" that she "refused to divulge the identity of the real father.

Mrs. Beckwith, according to the records, then countersued for divorce, accusing her husband of adultery.

According to court records, she admitted that she "executed a document purporting to state that" Beckwith "was not the father of the child," but explained that the document "was obtained by fraud and duress and thus of no force and effect."

She also said that shortly before the child's birth, she was "locked out of" the farm by her husband. After giving birth, she said she returned to West Germany. She added in court papers that her husband has refused to aid her financially, "although he is able to do so."

Mrs. Beckwith asked the court to make her husband finance the cost of her countersuit.

On March 10, 1975, Superior Court Judge Joseph M. F. Ryan Jr. ordered that she be given $1,000 for travel expenses and $3,000 for attorney fees on the condition that blood tests be made in Germany and sent here to "aid the court in arriving at the truth."

Mrs. Beckwith then asked the Appeals Court to strike down the requirement of the blood tests.

1976?

A Lincoln Heir?

A simple blood test ordered two months ago for a 7-year-old boy in West Germany was expected to settle a question of some significance: Was the boy the only known great-great-grandchild of Abraham Lincoln and, as such, entitled to become heir to a Lincoln family trust fund valued at more than $1 million?

The District of Columbia Court of Appeals ordered the test when the question arose during pretrial maneuvering in a divorce suit filed by Robert Todd Lincoln Beckwith, a 71-year-old great-grandchild of Lincoln, against Annemarie Hoffman Beckwith, 27. She is now living in West Berlin with the boy, Timothy Lincoln Beckwith.

Mr. Beckwith contended that he was not the child's father; he accused his wife of adultery. The court order allowed the defense until May 23 to complete arrangements for the blood test.

A sample of the boy's blood has not yet been delivered to Washington, and no one there connected with the case—neither the Family Division of Superior Court, where the divorce action is being heard, nor the lawyers for the plaintiff or the defendant — knows whether Mrs. Beckwith has or will comply with the court order.

The next move? "The court can apply sanctions," says Mr. Beckwith's attorney, Elizabeth R. Young. "That's what I'm working on right now, to try to find out what we can do."

▸ Abraham and Mary Todd Lincoln had four children, only one of whom, Robert, had any children. In turn, only one of those three children, Jessie, had a child, and that sole offspring, Robert Todd Lincoln Beckwith, has only one child, Timothy, now seven, who is therefore Abe Lincoln's only direct descendant. Or is he? The elder Beckwith is at present in court denying he is the boy's father. In England such a hassle might well involve a title. In the U.S. the issue is a divorce—and perhaps a trust fund worth more than $1 million. Beckwith, 71, and his 27-year-old estranged wife Annemarie Hoffman Beckwith have been fighting over a divorce for three years, each alleging adultery.

Now the District of Columbia's Court of Appeals has ruled that the boy, who lives in West Berlin with his mother, must undergo a blood test to help check Beckwith's claim of non-fatherhood—which would prove her adultery. As it happens, the trust fund, which was established by Lincoln's daughter-in-law (Beckwith's grandmother), could eventually go to the boy even if he is not Beckwith's. The reason is that in any subsequent case directly concerned with Timothy's legitimacy, the law would still be heavily weighted toward finding that when a woman gives birth, her husband is the child's father. Thus even if little Beckwith could no longer claim to be a Lincoln, he still might get the million dollars to soothe his disappointment.

LAW OFFICES OF

WISSOW, ODZA & STECKIW

FOURTH FLOOR

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AREA CODE 215
564-2466

January 14, 1986

Mr. Mark Neely, Jr., Editor
Lincoln Lore
Lincoln National Life Insurance Company
Ft. Wayne, Indiana 46801

Dear Mr. Neeley:

I have always wanted to write you a letter of appreciation for Lincoln Lore which I consider to be the most interesting of all the publications which I have the pleasure of reading. It is absolutely incredible how much has been written, is being written and apparently remains to be written on this subject.

I also write this letter because I wish to comment on the issue dated November, 1984 in which you discuss Andrew C. McLoughlin's essay on Lincoln and the Constitution. His contention that the President's "arbitrary arrests" were tyrannical and unconstitutional was not new in his time, nor is it today; it surfaces regularly along with the criticism of Washington and his expense accounts.

What is surprising, perhaps, is that Mr. McLoughlin was a lawyer and a professor of constitutional law. As such, he should have known better than to argue that the arbitrary arrests during the Lincoln administration were tyrannical and, therefore, unconstitutional. Whether an act is tyrannical is a matter of opinion; whether it is unconstitutional is a matter of law. Nothing is unconstitutional until the final judicial determination declares it to be so. Just because some action appears to be tyrannical, it does not necessarily follow that it is unconstitutional. Has there ever been any act in American history as tyrannical as Franklin Roosevelt's sweeping executive order imprisoning 200,000 American citizens of Japanese descent during World War II? Yet, nevertheless, it was held constitutional by the Supreme Court. And, as we know, we have engaged in many bitter and bloody military excursions without the formal declaration of war which the Constitution requires of the Congress.

LAW OFFICES OF

WISSOW, ODZA & STECKIW

Incidentally, I am sure you were aware of the recent death of Robert T. L. Beckwith, Lincoln's great-grandson who was described by the press as his last descendant. But was he?

Enclosed is a copy of the pertinent portions of the decision and opinion involving an ancillary procedure in the 1976 District of Columbia Court of Appeals divorce case of Beckwith vs. Beckwith. Note the basic facts and the express rejection of the question of Timothy Beckwith's legitimacy which I have marked on pp. 539, 542, 543 and 547. In 1977 the divorce was finally granted on the grounds of adultery with the court's agreeing that the wife's admission that Timothy Beckwith had been fathered by another man and Mr. Beckwith's medical evidence that he was incapable of procreation were sufficient to support the decree. Therefore, unless there has been other litigation holding to the contrary of which I am not aware, Timothy Beckwith is entitled to inherit under the Mary Harlan Lincoln Testamentary Trust which, I presume, named the direct descendants of Abraham Lincoln as its beneficiaries.

So, was Robert T. L. Beckwith the last descendant of Abraham Lincoln?

How ironic that the line of the man whose life and interests were so intimately associated with the practice of law that he told his partner that the election of a president would make no difference in the firm of Lincoln and Herndon should be clouded by the law and lawyers.

Sincerely,

LEONARD S. WISSOW

LSW/md
Enclosures

Annemarie Hoffman BECKWITH, Appellant,

v.

Robert T. L. BECKWITH, Appellee.

No. 9426.

District of Columbia Court of Appeals.

Argued Nov. 13, 1975.

Decided April 1, 1976.

Rehearing and Rehearing en Banc Denied June 1, 1976.

In action for absolute divorce on grounds of adultery brought by husband who alleged that child was born to his wife as result of commission of act charged in complaint, wife filed counterclaim against husband for, inter alia, absolute divorce on grounds of adultery or desertion. The Superior Court, Joseph M. F. Ryan, Jr., J., ordered, sua sponte, that wife submit herself and her child to blood-grouping tests and that payment of suit money and counsel fees be conditioned upon filing of test results with court, and wife appealed. The Court of Appeals, Taylor, J., held that court had jurisdiction to order mother to submit her child to blood-grouping tests for purpose of deciding issue of adultery though child was not party, not resident, and not represented by guardian ad litem; that court had authority under statute to make such order; that order of blood-grouping tests of child did not violate child's constitutional right to privacy or due process of law.

Remanded.

Kelly, J., concurred with opinion.

1. Divorce ⇐65

As nonresident defendant in divorce proceeding, wife, upon substituted service, was not subject to in personam jurisdiction of court. D.C.C.E. SCR, Dom.Rel.Rules 12(b), 13(a).

2. Divorce ⇐65

Where nonresident defendant to divorce proceeding, served by subtitute service, counterclaimed for divorce, her voluntary action gave rise to personal jurisdiction of court. D.C.C.E. SCR, Dom.Rel. Rules 12(b), 13(a).

3. Courts ⇐37(3)

Availing oneself of jurisdiction of court by filing voluntary claim subjects claimant to personal jurisdiction. D.C.C.E. SCR, Dom.Rel.Rules 12(b), 13(a).

4. Courts ⇐26, 29

Where there is subject matter jurisdiction, court having personal jurisdiction may, by its order, affect persons other than those personally before it, and may order act which has effect in another state or is to be carried out in another state.

5. Parent and Child ⇐2(5)

In cases involving internal affairs of family unit, court will not apply hard and fast rules of jurisdiction.

6. Divorce ⇐85

Superior court had jurisdiction in action for absolute divorce on grounds of adultery to order mother, who was before court, to submit her child to blood-grouping tests for sole purpose of deciding issue of adultery even though child was not party, not resident, not represented by guardian ad litem, and there was no request to court for support, maintenance, or custody. D.C.C.E. §§ 16-909, 16-2343.

7. Courts ⇐28

While in certain circumstances courts have declined to order acts by those personally present before court that affect others not present and in other states or countries, this reluctance is reluctance to exercise jurisdiction, not lack of jurisdiction; it may be overcome by exigencies such as the exigencies of domestic life.

8. Bastards ⇐8

Statute providing that divorce for cause does not affect legitimacy of issue of marriage merely removes adjudication of

status of child from divorce proceedings when subject matter of divorce action would call into question legitimacy and does not create mandatory duty for, or grant discretionary authority to, court to determine legitimacy so as to provide basis for subject matter jurisdiction. D.C.C.E. § 16-909.

9. Divorce ⇐172

Child, not party to divorce action, would not be bound by decision in such case that he was legitimate or illegitimate and such decision must be carefully distinguished from decision on issue of legitimacy vel non for purposes other than proving adultery. D.C.C.E. § 16-909.

10. Divorce ⇐85

Statute, providing that when it is relevant to action for divorce, court may direct that mother, child, and father submit to blood tests, gave superior court discretionary authority to order mother to submit her child to blood-grouping tests for sole purpose of deciding issue of adultery. D.C.C.E. § 16-2343.

11. Divorce ⇐85

Where trial court made findings as to relevance of evidence that might be adduced from blood tests as going to issue of adultery in divorce action, there was no abuse of discretion in order that mother submit her child to blood-grouping tests. D.C.C.E. § 16-2343.

12. Constitutional Law ⇐82

Ordering of blood-grouping tests of child to be performed by reputable medical laboratory following accepted medical procedures in divorce proceeding to prove adultery of child's mother did not violate child's constitutional right to privacy. D.C.C.E. § 16-2343; D.C.C.E. SCR, Dom. Rel.Rule 35.

13. Constitutional Law ⇐305(3)

Where interests of mother in divorce proceeding brought against her by her husband on grounds of adultery did not conflict with those of her minor child, and where interests of child were fully and ably protected by mother, failure to appoint guardian ad litem for child whose legitimacy was at issue did not deny child due process of law. D.C.C.E. SCR, Dom. Rel.Rules 17(c, e), 35; D.C.C.E. § 16-909.

Thomas Penfield Jackson, Washington, D. C., with whom Patricia D. Gurne, Washington, D. C., was on the brief, for appellant.

Elizabeth R. Young, Washington, D. C., for appellee.

Before KELLY and KERN, Associate Judges, and TAYLOR, Associate Judge, Superior Court.*

TAYLOR, Associate Judge:

In an action for absolute divorce on the grounds of adultery the husband-appellee alleged that a child was born to his wife as a result of the commission of the act charged in the complaint. He was denied permission to add the child as a party defendant. The wife, in her answer, admitted that she executed a document purporting to state that the appellee was not the father of the child, but alleged that the document was obtained by fraud and duress and thus of no force and effect. She filed a counterclaim against the appellee for, *inter alia*, an absolute divorce on the grounds of adultery or desertion and moved for suit money and counsel fees.

On March 10, 1975, the lower court granted appellant's motion. However, the court at the same time, sua sponte, ordered (1) that appellant submit herself and her child to blood grouping tests and (2) that

* Sitting by designation pursuant to D.C.Code 1973, § 11-707(a).

payment of the suit money and counsel fees be conditioned upon the filing of the test results with the court.[1] In its March 19, 1975 order on reconsideration the court reaffirmed its March 10 order in all respects and ruled that the legitimacy of the child was in issue in this proceeding pursuant to D.C.Code 1973, § 16-909. No guardian ad litem was specifically requested of, or appointed by, the court. This appeal is from both aspects of the sua sponte order of the court.[2]

The issues raised by the answers to the complaint and counterclaim have not come on for trial even though the complaint was filed over two years ago. The delay is, in part, the result of the wife's efforts to assure that the outcome of this proceeding will not affect adversely her child's right, through her husband, to inherit under the Mary Harlan Lincoln Testamentary Trust, a trust established by the wife of Todd Lincoln, Abraham Lincoln's son. The lengthy pleadings and judicial actions thereon are set out in the Appendix of this opinion.

Appellant's challenges to the order requiring her to submit her child to blood grouping tests, and to do so prior to the payment of suit money and counsel fees, will be considered in our resolution of the following five issues: (I) Does the court have jurisdiction in an action for absolute divorce on the grounds of adultery to order a mother, who is before the court, to submit her child to blood grouping tests for the sole purpose of deciding the issue of adultery where the child is not a party, not a resident, not represented by a guardian ad litem, and where there is no request before the court for support, maintenance, or custody? (II) Does the court in an action for absolute divorce on the grounds of adultery have discretionary authority under a statute or rule to order a mother who is before the court to submit her child to blood grouping tests for the sole purpose of deciding the issue of adultery and, if so, was such discretion exercised without abuse in this case? (III) Does the ordering of blood grouping tests of a child in a divorce proceeding to prove adultery violate the child's constitutional right to privacy?[3] (IV) Does the absence of a guardian ad litem in this case deny the child due process of law? (V) Does the conditioning of an award of suit money and counsel fees on submission of a mother and her child to blood grouping tests violate the mother's right to counsel and due process?

We answer questions I and II in the affirmative, and questions III and IV in the negative. For the reasons set forth herein, we do not reach question V.

I.

The initial question is one of first impression in this jurisdiction and, insofar as we are aware, any other jurisdiction. The question raises issues relating to the court's personal jurisdiction over the appellant, jurisdiction over the subject matter, and jurisdiction to enter an order affecting a nonparty.[4] First we consider appellant's

1. The appellee was also required to submit to blood grouping tests and to cause the results to be filed with the court.

2. Neither the appellant nor the appellee challenges the award of suit money (travel expenses from Germany) and counsel fees.

3. Appellant does not challenge the constitutionality of the blood test order with respect to her submission on these grounds. Appellant's lone constitutional objection with respect to her own rights is noted in question V.

4. Specifically, appellant argues that the court was without jurisdiction to require her to submit her minor child to blood grouping tests because:

(a) The infant is not a party and has not been served with process in the lawsuit and is not represented by counsel or a Guardian *ad litem*; and

(b) The infant is not a resident of nor physically present in the District of Columbia but is a resident of West Berlin, the Federal Republic of Germany; and

(c) The legitimacy *vel non* of the infant is not in issue in the lawsuit; and

contention that the filing of her counterclaim did not give the lower court personal jurisdiction over her.

[1–3] Superior Court Domestic Relations Rule 13(a) provides that a defendant brought suit upon by process by which this court did not acquire jurisdiction to render a personal judgment need not file a compulsory counterclaim.[5] As a nonresident defendant to a divorce proceeding, Mrs. Beckwith, upon substitute service, was not subject to in personam jurisdiction. She could have answered and defended on the merits after motions referred to in the Appendix were overruled without waiving her objections to the court's jurisdiction.[6] However, she chose to counterclaim for divorce, which as not compulsory, was voluntary, and gave rise to personal jurisdiction. It is well settled that availing oneself of the jurisdiction of a court by filing a voluntary claim subjects the claimant to personal jurisdiction.[7] We now turn to the question of subject matter jurisdiction and jurisdiction to enter an order affecting a nonparty.

[4–6] Where there is subject matter jurisdiction, a court having personal jurisdiction may by its order affect persons other than those personally before it, *Alves v. Alves*, D.C.App., 262 A.2d 111 (1970), and may order an act which has an effect in another state or is to be carried out in anothe state. *New York v. O'Neill*, 359 U.S. 1, 79 S.Ct. 564, 3 L.Ed.2d 585 (1959); *Argent v. Argent*, 130 U.S.App.D.C. 46, 396 F.2d 695 (1968); H. Goodrich & E. Scoles, Conflicts of Laws, §§ 77–78 (4th ed. 1964). In the *Alves* case, the parents were personally before the court. This court held that the lower court had jurisdiction to enter an order that would determine the child's custodian, although the child was not present or a party. In deciding that a matter affecting the child could be decided without his presence, this court rejected "hard and fast rules of jurisdiction" in cases involving the internal affairs of the family unit. Similarly, we do so in the instant case and hold that the lower court had jurisdiction to issue the order challenged in this appeal.

In this case the subject matter over which the court had jurisdiction is the question of the paternity of the child as proof on the issue of adultery. The basic pleadings in this case call into question the paternity of the child. Appellee-plaintiff in support of his complaint for divorce on grounds of adultery denies his paternity. He implies that blood grouping tests are or may be inconsistent with his paternity. Appellant-defendant, by her answer, contests the validity of his allegations and thus, by implication, denies that blood grouping tests could be inconsistent. Subject matter jurisdiction is jurisdiction over a matter in controversy. As blood tests are relevant to a determination of the issue of adultery in this case, and the possible results are in dispute by the parties, blood groupings are in controversy[8] and thus part of the subject matter of this case.

In failing to recognize that the matter in controversy was the question of the paternity of the child as proof on the issue of adultery, as distinguished from the question of the legitimacy of the child for all purposes, appellant misconstrues the real

(d) No relief in the nature of maintenance, support or custody is sought on behalf of or against the infant. [Brief and Appendix for Appellant at 1.]

5. *See Advisory Committee's Note of 1963 to Subdivision (a) of Rule 13.* 3 J. Moore, Federal Practice ¶ 13.01, at 29 (2d ed. 1972).

6. *Morfessis v. Marvins Credit, Inc.*, D.C. Mun.App., 77 A.2d 178 (1950); Super.Ct. Dom.Rel.R. 12(b). *But cf. Davis v. Davis*, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26 (1938).

7. *Adam v. Saenger*, 303 U.S. 59, 67–68, 58 S.Ct. 454, 82 L.Ed. 649 (1938).

8. *Beach v. Beach*, 72 App.D.C. 318, 114 F.2d 479, 481–82 (1940).

jurisdictional basis of the order of the lower court. The order is not directed to the child. It is directed to a party who personally appeared before the court, and it requires her to perform an act within her power to perform as a lawful custodian of the child. The order requires no more of her than an order requiring her to give up custody of the child or to feed and clothe the child within the limits of a maintenance order, and in both such cases orders for blood tests have been upheld even though the child was not an actual party. *Beach v. Beach*, 72 App.D.C. 318, 114 F.2d 479 (1940); *State v. Cornett*, 391 P.2d 277 (Okl.1964).

In *Beach*, *supra*, a divorce proceeding on the grounds of adultery in which maintenance for the child was requested, the court ordered blood grouping tests of the husband, wife and child to aid in determining paternity. It did so pursuant to Rule 35 of the Federal Rules of Civil Procedure, which at that time permitted the court to order a physical examination only of a party.[9] The court solved the problem presented by the absence of the child by concluding that the child was "in substance" a party for purposes of the case because "[s]ocially, [the child] is a most important party." *Id.*, 72 App.D.C. at 321, 114 F.2d at 482. However, the child was not made an actual party.

In *State v. Cornett*, *supra*, the husband brought an action for absolute divorce on the grounds of adultery alleging that he was not the father of the child born during the marriage. The wife counterclaimed for divorce, alimony, custody of the child and child support money. She contended that the trial court was without power to order a blood test for the child because no guardian ad litem had been appointed and the child had not been made a formal party plaintiff or defendant in the suit. In holding that the court had jurisdiction to order the wife to submit her child to a blood test the court held that:

> [A] child whose paternity is questioned in a divorce action is not a necessary party to the action, and that the joinder of such child as a party is not a pre-requisite to the ordering of blood tests for the child. [*Id.*, 391 P.2d at 282.]

The appellant would distinguish the *Beach* and *Cornett* cases on the basis that they involved maintenance or custody, whereas the instant case does not. Apparently it is appellant's view that maintenance and custody cases directly affect the welfare of the child, whereas in an adultery case the welfare of the child is not affected directly, and that it is only in the former situation that the court has subject matter jurisdiction to issue an order affecting a non-party. For jurisdictional purposes this is a distinction without a difference. In both situations the court had in personam jurisdiction over the mother; and in both situations the matter in controversy affects the affairs of the family as a unit. Since we reject "hard and fast rules of jurisdiction" in matters affecting the family unit, as did the court in the *Alves* case, *supra*, the degree to which the family unit is affected does not control the question of jurisdiction. Whether or not jurisdiction should be exercised in either case is a separate question.

[7] While in certain circumstances courts have declined to order acts by those personally before the court that affect others not present and in other states or countries, this reluctance is a reluctance to exercise jurisdiction, not lack of jurisdiction.[10] It may be overcome by exigencies such as the exigencies of domestic life, as here.[11] Furthermore, as recognized by the lower court, and as stated in *State v. Cornett*,

9. The rule was amended in 1970 so as to provide, among other things, that the court may order a physical examination of one who is under the legal control of a party.

10. H. Goodrich & E. Scoles, *supra* § 78.

11. See Judge Traynor's opinion in *Sampsell v. Superior Court*, 32 Cal.2d 763, 197 P.2d 739 (1948).

"the trial of a lawsuit is essentially a search for the truth and not a mere sporting proposition or game in which arbitrary and artificial rules should be applied in order to afford each side an equal chance of winning." 391 P.2d at 283.

D.C.Code 1973, § 16–2343, discussed in Part II, *infra*, recognizes the relevancy of blood tests in adultery actions by providing that in such cases the court may order blood tests of the mother, father, and minor children. If the exercise of jurisdiction to order blood tests of children were limited to those instances where the children are physically present or domiciled in the District of Columbia, or the subject of a support, maintenance or custody action, it would vitiate the statute's use in many adultery cases because the children often reside with one spouse in a jurisdiction different from that of the other spouse after the separation of the parents.[12] However, a relevant consideration in each case is due process; namely, are the child's interests, insofar as they are affected by an order, adequately protected by his mother. In the case before us the record shows that the child's interests are adequately protected.[13] We hasten to add that the interests which are affected in this case relate only to the determination of adultery, as the child, for the reasons stated at the conclusion of the Part I, is not bound by the result of this proceeding in any subsequent case where his legitimacy is questioned.

[8] Our conclusion that the court had jurisdiction and that there was no abuse of discretion in exercising same has been without reliance upon the primary basis stated by the lower court for its jurisdiction. The lower court based its determination of subject matter jurisdiction primarily on D.C.Code 1973, § 16–909, stating in its March 19, 1975 order that § 16–909 gave rise to a "mandatory duty of the court to establish legitimacy. . . ." We reach a contrary conclusion.

D.C.Code 1973, § 16–909, provides in full as follows:

> *[A divorce for a cause provided for by this chapter does not affect the legitimacy of the issue* of the marriage dissolved by the divorce, but the legitimacy of the issue, if questioned, shall be tried and determined according to the course of the common law. [Emphasis added.]

The predecessor statutes to § 16–909 do not appear to have been the subject of judicial interpretation in this jurisdiction. The legislative history is quite sparse, and the State of Maryland did not have a similar statute at any time prior to § 16–909's enactment.[14]

The first appearance of the present § 16–909 was in the 1857 proposed code for the District of Columbia that was not passed by the voters and therefore did not become positive law. It provided:

> *A divorce for other couses than those hereinbefore speciolly provided for, shall not affect the legitimacy of the issue* of the marriage; but the legitimacy of such issue, if questioned, shall be tried and determined according to the course of the common law.[15] [Emphasis added.]

In 1860, § 16–909 first appeared as positive law in the District of Columbia as follows:

> *And be it further enacted, that a divorce for couses not hereinbefore*

12. This split-residence problem was the basic reason this court, in *Alves*, rejected "hard and fast rules" and exercised jurisdiction. 282 A.2d at 117.

13. The adequacy of the appellant's protection of the child's interest is shown in Part IV, *infra*, where we conclude that the failure of the court to appoint a guardian ad litem did not deny the child due process of law.

14. "The common law, all British statutes in force in Maryland on February 27, 1801 . . . shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of the 1901 Code." D.C.Code 1973, § 49–301.

15. Revised Code of the District of Columbia tit. X, ch. 69, § 12 (1857).

cially provided for, shall not affect the legitimacy of the issue of the marriage; but the legitimacy of such issue, if questioned, shall be tried and determined, according to the course of the common law.[16] [Emphasis added.]

The 1860 provision remained unchanged as to substance during subsequent enactments and compilations[17] until 1901. In 1901 it was changed to substantially its present form,[18] with changes in phraseology in 1963.[19]

By comparison of the successive statutes it is apparent that all of § 16–909's predecessors provided that a divorce should not affect the actual status of the child as legitimate or not, except for those causes for divorce that were "hereinbefore specially provided for" in the prior to 1901 enactments. In those enactments such causes were bigamy and lunacy.[20] The pre-1901 statutes never provided that a divorce on grounds of adultery could affect the legitimacy of the child, even though evidence of illegitimacy was presented to prove the underlying cause of action for divorce. After the enactment of 1901, § 16–909 precluded all divorce actions from affecting the status of the child as legitimate or not.

The highest court in the Commonwealth of Massachusetts has interpreted a statute most similar to § 16–909, namely:

> A divorce for adultery committed by the wife shall not affect the legitimacy of the issue of the marriage, but such legitimacy, if questioned, shall be tried and determined according to the course of the common law. [G.L. (Ter.Ed.) ch. 208, § 25.]

In *Sayles v. Sayles*, 323 Mass. 66, 80 N.E. 2d 21 (1948), the husband sued for absolute divorce on the grounds of adultery. The lower court found that "in fact the child is the result of intercourse by the libellee and a man other than the libellant." In applying its statute, the court on appeal held that it relied upon the aforesaid finding "only to the extent that it is a finding of adultery. . . . [because] the issue is not illegitimacy but adultery, as to which the birth of a child is not an essential element. . . . The child will not be bound by the decision."[21]

Our analysis of § 16–909's derivation and the opinion in the *Soyles* case, leads us to conclude that § 16–909 merely removes the adjudication of the status of the child from the divorce proceedings when the subject matter of the divorce action would call into question legitimacy, and does not create a mandatory duty for, or grant discretionary authority to, the court to determine legitimacy so as to provide a basis for subject matter jurisdiction.[22]

16. Act of June 19, 1860, ch. 158, § 8, 12 Stat. 60.

17. Revised Statutes of the United States relating to the District of Columbia, ch. 22, § 744 (Washington 1875); The Compiled Statutes in force in the District of Columbia, ch. 30, § 40 (W. Abert & B. Lovejoy 1894).

18. Act of March 3, 1901, ch. 854, § 974, 31 Stat. 1346.

19. Act of December 23, 1963, ch. 9, § 16–909, 77 Stat. 561.

20. Revised Statutes of the United States relating to the District of Columbia, ch. 22, §§ 742–44 (Washington 1875); The Compiled Statutes in force in the District of Columbia, ch. 30, §§ 38–40 (W. Abert & B. Lovejoy 1894). In the non-enacted 1857 Revised Code such causes included certain causes in addition to bigamy and lunacy. Revised Code of the District of Columbia, tit. X, ch. 69, §§ 9–12 (1857).

21. *Sayles v. Sayles*, *supra* at 23. (There is no indication in the reported case that the child was made a party.)

22. Our interpretation of § 16–909 is well summarized by Flaherty in his work on District of Columbia practice, as follows:

> Where the issue as to the legitimacy of a child is raised in a divorce action, the finding of the court on that issue is not determinative of the question of the paternity of the husband in such divorce suit, even though he may have successfully disputed the legitimacy of the child insofar as concerns the immediate purposes of the divorce case as such, but the question of the legiti-

[9] Finally, we hold, as did the court in *Sayles*, and in accordance with the prevailing authority,[23] that the child will not be bound by a decision in the instant case that the appellee is not his father. Although couched in terms of legitimacy, such a decision must be carefully distinguished from a decision on the issue of legitimacy *vel non* for purposes other than proving adultery.

II.

Jurisdiction having been found, the next question is whether the court had discretionary authority under a rule or statute to order the appellant to submit her child to blood grouping tests for the sole purpose of deciding the issue of adultery and, if so, was such discretion exercised without abuse in this case.

Two provisions in the Rules of the Superior Court, and one in the District of Columbia Code, provide for the issuance of an order requiring a mother to submit her child to blood tests, specifically, Super.Ct. Dom.Rel.R. 35; Super.Ct.Dom.Rel.R. 405 (f); and D.C.Code 1973, § 16–2343. Rule 405(f) refers only to paternity cases initiated pursuant to D.C.Code 1973, § 11–1101(11) and requires "written motion." Superior Court Domestic Relations Rule 35 incorporates by reference Civil Rule 35 and requires "notice and motion." D.C. Code 1973, § 16–2343 refers to all cases initiated pursuant to D.C.Code 1973, § 11–1101, inclusive of divorce on the grounds of adultery, and is silent on the question of notice and motion.

[10] We conclude that § 16–2343 is authority for the order of the lower court in this case. Section 16–2343 provides that when it is relevant to an action for divorce:

> [T]he court may direct that the mother, child, and the respondent submit to one or more blood tests to determine whether or not the respondent can be excluded as being the father of the child, but the results of the test may be admitted as evidence only in cases where the respondent does not object to its admissability.

Here, since blood tests are relevant to this action for divorce, § 16–2343 is applicable.[24]

[11] Although the lower court did not refer to § 16–2343 in its order on reconsideration of March 19, 1975, it did make findings therein as to the relevance of the evidence that may be adduced from the blood tests to the matter in controversy and the need for such evidence in determining the truth.[25] For these reasons we conclude that the trial court did not abuse its discretion.[26]

macy of the child must be determined, if at all, in an independent action for that purpose. [2 P. Flaherty, District of Columbia Practice With Forms, § 1600 (1949).]

23. The authorities are well summarized in Annot., 65 A.L.R.2d 1381 (1959), as follows:

> Even though the paternity of a child has been placed in issue and adjudicated in an action for a divorce or annulment, and it is therefore res judicata as between the husband and wife . . . the adjudication is not binding on the child in a subsequent action between him and one of the spouses if he was not made a party to the action for divorce or annulment. [*Id.* at 1396.]
>
> And an adjudication of illegitimacy or non-paternity is not binding on the child when it claims a share of a decedent's estate as heir of the husband or an interest in a trust as the lawful child of the husband. [*Id.* at 1397. The one exception to this rule is by statute in Kentucky. *Id.* at 1399.]

24. Neither the lower court nor any of the parties referred to § 16–2343 in this proceeding. The statute was amended in 1971 so as to provide for the ordering of blood tests in divorce proceedings, the prior provision limiting blood tests to paternity cases. Appellant was permitted to submit a supplemental brief concerning the effect of § 16–2343 in this proceeding. Appellant's position that "mother" in the statute should be read to mean "father," and "respondent" to refer to "mother" in this proceeding, is without merit.

25. Part I, *supra*.

26. *See generally Minor v. District of Columbia*, D.C.App., 241 A.2d 196 (1968).

It is unnecessary to our decision in this case to decide if notice and motion are required under § 16–2343 as the purpose of notice and motion, the opportunity for each side to present its position, has been served by the attention given by the trial court to appellant's motion for reconsideration.

As § 16–2343 provides authority in this case for the court's order we need not reach the question of whether Rule 35 provides a basis for the court's order, as urged by appellee, nor need we consider appellant's numerous objections to the application of Rule 35 to this case.[27]

III.

[12] We consider, and reject, appellant's contention that the ordering of blood grouping tests of a child in a divorce proceeding to prove adultery violates the child's constitutional right to privacy.

The Supreme Court in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the principal blood test case, set out the factors for our consideration. The defendant in *Schmerber* had been arrested at a hospital where he was undergoing treatment for injuries sustained in an automobile accident. Over his objections, at the direction of a police officer, a sample of defendant's blood was withdrawn and analyzed. The Supreme Court found that the taking of the defendant's blood, its being tested and its admission into evidence did not violate the defendant's right to the "security of one's privacy." *Id.* at 767, 86 S.Ct. 1826, 16 L.Ed.2d 908. In reaching its conclusion the Court considered two questions that are of relevance to our inquiry: (1) was the intrusion carried out in a reasonable manner and (2) was the nature of the intrusion reasonable under the circumstances. *Id.* at 768, 86 S. Ct. 1826, 16 L.Ed.2d 908.

First the intrusion ordered by the lower court will be carried out in a reasonable manner. The tests are to be performed by a reputable medical laboratory following accepted medical procedures. Second, the nature of the intrusion ordered is reasonable under the circumstances. The probative value of blood tests in determining paternity is great.[28] The extent of the intrusion is minor. Blood tests are routine in our everyday life, encountered in applying for marriage licenses, going into the military and entering college.[29]

Those courts that have considered similar constitutional challenges to the ordering of blood grouping tests in matters involving paternity have uniformly rejected them.[30] In both *State v. Cornett*[31] and *Anthony v. Anthony*,[32] blood tests to determine nonpaternity in divorce proceedings on grounds of adultery were held to be nonviolative of the child's right to privacy. In *Cortese v. Cortese*[33] blood tests of a child in a paternity proceeding were held to not infringe upon the child's right to privacy.[34]

ing the predecessor statute. The exercise of discretion will not be disturbed unless it has been abused. *In re Maitullath*, 38 App.D.C. 497 (1912). *See also Etty v. Middleton*, D.C. Mun.App., 62 A.2d 371 (1948).

27. The concurring opinion relies on legislative history for the view that D.C.Code 1973, § 16–2343 does not apply to divorce proceedings. Our application of the statute rests on its plain wording because "there is no need to refer to the legislative history where the statutory language is clear." *Ex Parte Collett*, 337 U.S. 55, 61, 69 S.Ct. 944, 947, 93 L.Ed. 1207 (1949).

28. S. Schatkin, Disputed Paternity Proceedings (4th ed. 1967).

29. *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, 1 L.Ed.2d 448 (1957).

30. *See generally* Annot., 46 A.L.R.2d 1000 (1956).

31. 391 P.2d 277 (Okl.1964).

32. 9 N.J.Super. 411, 74 A.2d 919 (1950).

33. 10 N.J.Super. 152, 76 A.2d 717 (1950).

34. *Cortese* was cited with approval in *Breithaupt v. Abram*, *supra* 352 U.S. at 437, 77 S.Ct. 408.

Appellant submits that the order violates her son's right to privacy as articulated in *Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891), and its progeny. Appellant's reliance on *Botsford* as establishing a constitutional right to privacy that restricts this court's authority to order physical examination is misplaced. The Supreme Court in *Camden and Suburban R. Co. v. Stetson*, 177 U.S. 172, 20 S.Ct. 617, 44 L.Ed. 721 (1900), stated specifically that there was no intimation in *Botsford* that physical examination "would be a violation of the Federal Constitution . . . ." *Id.* at 174, 20 S.Ct. at 618. The Court, in *Botsford*, merely held that absent statutory or similar authority, federal courts could not order a physical examination. *Botsford* does not apply to the instant case because, as noted in Part II, *supra*, statutory authority for the physical examination here ordered is found in D.C.Code 1973, § 16–2343.[35] Those cases cited by appellant as *Botsford's* progeny were not blood test cases and are not relevant to our inquiry.

IV.

[13] The court below did not appoint a guardian ad litem either in its sua sponte order of March 10, 1975 or in its order on reconsideration of March 19, 1975. The appellant never specifically requested such an appointment, but alluded to the absence of a guardian ad litem in her motion for reconsideration. On appeal appellant urges that the absence of a guardian ad litem in this case denies the child due process of law.[36] In view of the procedural history of this case, we believe that the question should be decided at this time.

We note initially that the appointment of a guardian ad litem under Super.Ct.Dom. Rel.R. 17(c) and (e) is limited, respectively, to parties and to proceedings within the Family Division involving custody of a minor child. Rule 17 does not specifically provide for the appointment of a guardian ad litem in cases such as the instant case, and appellant does not contend that the failure to appoint a guardian ad litem constituted procedural irregularity. However, no one can gainsay the right of the court to appoint a guardian ad litem when necessary for the protection of an infant who is affected by an order of the court. Thus, the question is solely whether the failure of the lower court to exercise its discretion and appoint a guardian ad litem denied the child due process of law. We hold the child has not been denied due process as the interests of the child are being fully and ably protected by the appellant in this proceeding.

As shown in Part III, *supra*, the appellant contended that the order appealed from violated the child's constitutional right to privacy. We concluded that the child's right to privacy was not violated by holding that the intrusion by the taking of the blood would be carried out in a reasonable manner and that the nature of the intrusion was reasonable under the circumstances. Our research convinces us that the appellant fully and ably presented the argument and that the presence of a guardian ad litem would not have resulted in a different conclusion.

This appeal was brought by a mother who was properly concerned over the effect of the lower court's order on the issue of legitimacy in some other proceeding, vigorously pressing the point that there was no issue of legitimacy in this case as she was exercising her "entirely natural

35. Also, were Rule 35 to be applied here, it would provide the basis for the order under *Botsford, Sibbach v. Wilson*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941); *Beach v. Beach*, *supra*.

36. Appellant also contends that the child was denied due process for jurisdictional reasons. For the reasons stated in Part I, *supra*, we hold that there has not been a denial of due process on this ground.

to protect her infant son's inheritance."[37] Her efforts on behalf of her child lead to our conclusion in Part I, *supra*, that the child will not be bound by an adjudication in this case on the issue of paternity. A guardian ad litem could have accomplished no more. Accordingly, we conclude that there is no indication in the record that the interests of the appellant conflict with those of her minor child and there is every reason to believe that their interests are identical; that the interests of the child are being fully and ably protected by the appellant; and that the failure to appoint a guardian ad litem in this case does not deny the child due process of law. *Groulx v. Groulx*, 98 N.H. 481, 103 A.2d 188 (1954); *Anthony v. Anthony, supra; State v. Cornett, supra. See also* Annot., 65 A.L.R.2d at 1393.

V.

The final issue presented by appellant is whether or not the trial court's conditioning of the order for suit money and counsel fees upon the prior filing of blood test results with the court denies appellant due process of law. It is not necessary to determine this issue as the appellee, both at oral argument and in his opposition to appellant's motion to reconsider, has consented to the striking of the condition. Thus, the trial court on remand will strike the "prior to" condition of its March 10, 1975 order and will issue separate orders for (1) suit money and counsel fees and (2) blood grouping tests.

Accordingly, the proceeding is remanded for action consistent with this opinion.

So ordered.

APPENDIX

The parties to this action, Robert T. L. Beckwith, plaintiff-appellee, and Annemarie Hoffman Beckwith, defendant-appellant, were married in Hartfield, Middlesex County, Virginia, on November 6, 1967. A male child, Timothy was born on October 14, 1968. Appellee-husband filed a verified complaint in the Superior Court on October 30, 1973, for a decree of absolute divorce on the grounds of adultery, stating that the male child born to appellant during their marriage was admitted by her not to be his son. Plaintiff-appellee filed an amended complaint for absolute divorce on November 2, 1973, seeking to add a declaratory judgment that he was not the father of Timothy Lincoln Beckwith. On November 26, 1973, plaintiff-appellee sought by motion to amend the complaint by adding Timothy Beckwith as a party defendant.

On January 9, 1974, defendant-appellant sought by motion to quash service of process and return of service of process. Defendant-appellant then moved to dismiss or strike the amended complaint for declaratory judgment on January 22, 1974. Judge Nunzio, on March 12, 1974, denied the motion to quash service of process and return of service of process, denied plaintiff's motion to amend complaint by adding Timothy Beckwith as a party and granted the motion to dismiss or strike the amended complaint for declaratory judgment that plaintiff is not father of Timothy Beckwith, dismissing the amended complaint. On March 20, 1974, defendant-appellant moved to dismiss the complaint for lack of subject matter jurisdiction, claiming defendant was not a bona fide resident of the District of Columbia. Judge Pryor, on July 31, 1974, denied the motion to dismiss. On August 29, 1974, defendant-appellant moved to enlarge time to respond to the complaint and a consent order was issued by Judge Beard on August 29, 1974, granting the motion.

An answer and counterclaim for divorce were filed by appellant on September 27, 1974, alleging cruelty, adultery, and desertion and requesting alimony and counsel

37. Appellant's Memorandum of Points and Authorities in Support of Motion to Dismiss or Strike Amended Complaint for Declaratory Judgment at 6.

APPENDIX—Continued

fees.[1] Also, on September 27, 1974, the appellant filed a motion for suit money and counsel fees pendente lite pursuant to D. C.Code 1973, § 16–911. On November 20, 1974, the case was assigned to Judge Ryan for all purposes. On March 10, 1975, the court, after consideration of the opposition to the motion and argument by counsel, issued a written order granting appellant's motion for suit money and counsel fees, conditioned, sua sponte, as follows:

> [P]rovided that prior to the payment of the aforesaid sums by the plaintiff [appellee] the Oscar B. Hunter Memorial Laboratory, 915 19th Street, N.W., Washington, D.C. obtains and files with the Court blood tests of the plaintiff Robert T. L. Beckwith, defendant Annemarie Hoffman Beckwith, and the male child born to the defendant in Williamsburg, Virginia, on the 14th day of October 1968, the Laboratory to arrange for the work to be done in West Germany, and counsel for the plaintiff and defendant to make the necessary arrangements for the tests with the Laboratory; all costs incident to the making and filing of the aforesaid tests to be paid by plaintiff.

The appellant on March 3, 1975, filed with the trial court a motion to reconsider portions of its "ruling on motion of defendant," which this court considers as a motion for reconsideration of the trial court's March 10, 1975 written order.[2] On March 19, 1975, the trial court in an "Opinion and Order" filed on April 2, 1975, addressed itself to the motion for reconsideration and set forth its reasons for denying it and reaffirming the court's order of March 10, 1975. It is from the denial of the motion for reconsideration that a Notice of Appeal was filed.[3]

KELLY, Associate Judge (concurring):

While I do not doubt that the trial court had authority to order the appellant to submit herself and her child to blood grouping tests, I am not persuaded that D.C.Code 1973 § 16–2343 is the source of this authority. My reading of the legislative history of § 16–2343 leads me to believe that it applies only to proceedings to establish paternity, D.C.Code 1973, § 11–1101(11), actions brought against a putative father to enforce support of his child. D.C.Code 1973, §§ 11–1101(3), (10) and actions seeking custody of minor children, D.C.Code 1973, § 11–1101(4).

As the majority states, the predecessor statute to D.C.Code 1973, § 16–2343 was limited specifically to the paternity cases, the pertinent language being: "When it is relevant to the prosecution or defense of an illegitimacy action . . . ." In its present form, the section provides:

> When it is relevant to an action over which the Division has jurisdiction under section 11–1101, the court may direct

1. An amended counterclaim was filed on March 10, 1975, adding a "Counter defendant (co-respondent)."

2. The motion to reconsider was filed on March 3, 1975, seven days before the actual written order of March 10 was filed. The motion for suit money and counsel fees was filed September 27, 1974, but apparently not heard until February 13, 1975. (A docket entry on that date states that an order was to be presented.) A proposed order was mailed by appellee to appellant on February 19, 1975, but was not presented to the trial judge until March 10, 1975, due to, as stated by the trial judge, "deficiencies in the handling of this pleading by the clerks office. . . ." While the motion for reconsideration was directed to the court's ruling of February 13, 1975, and was filed some seven days before the actual written order, it nonetheless encompassed all points referred to in the signed March 10, 1975 order. Thus, in the circumstances of this case the court construes the motion for reconsideration as being from the March 10, 1975 order.

3. The Notice of Appeal was filed on April 4, 1975, from the "order of this court entered on the 14th day of March, 1975." The reference to March 14, 1975, is obviously a typographical error, and has been so considered by the parties, in that the date of the order appealed from is March 19, 1975.

that the mother, child, and the respondent submit to one or more blood tests to determine whether or not the respondent can be excluded as being the father of the child, but the results of the test may be admitted as evidence only in cases where the respondent does not object to its admissibility. Where the parties cannot afford the costs of a blood test, the court may direct the Department of Public Health to perform such tests without fee. D.C.Code 1973, § 16–2343.

Concededly, the first clause of the section as amended appears to apply this provision to all actions under which the Division has jurisdiction pursuant to D.C.Code 1973, § 11–1101, including divorce, where paternity is relevant. In my judgment, however, this interpretation is not supported by its legislative history.

The provision was first introduced in the House as part of House Bill No. H.R. 16196, 91st Cong., 2d Sess. (1972). In that bill the provision appeared, in the identical language in which it ultimately was enacted, under the heading "*Subchapter II.—Paternity Proceedings.*" The committee report which accompanied H.R. 16196 explained that:

> The provisions of this subchapter relate to the establishment of paternity and to provide for the support of children born out of wedlock. [H.R. Rep. No. 907, 91st Cong., 2d Sess. at 58 (1972).]

The committee noted that one purpose of the subchapter was to separate jurisdiction over paternity proceedings from that of juvenile cases and to provide that paternity proceedings become civil rather than quasi-criminal as had been the case under then existing statutes. *Id.* at 58–9. Another stated purpose of the subchapter was to allow the Corporation Counsel to "bring an action on behalf of a wife or child . . . to enforce the support of the wife or child where it appears that a public burden has been incurred or may be incurred." *Id.* at 59. With respect to blood tests, the report stated:

> When blood tests are relevant to an action filed *under this subchapter*, the court may direct the mother, child, and respondent to submit to one or more tests to determine whether the respondent can be excluded as being the father of the child. The results of any test may be admitted only where the respondent does not object. [*Id.*, at 59; emphasis supplied.]

No mention is made in the report of any legislative intent to extend the application of the blood test provision beyond those proceedings specifically referred to in the report. Consequently, I do not believe we can infer that Congress intended to extend this provision to divorce proceedings. Accordingly, I would rest the trial court's authority to order the blood tests on Super. Ct.Dom.Rel.R. 35(a), which provides:

> *Order for Examination.* When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.[1]

The notice and motion requirements of the rule, as the majority notes, have been served by the attention given to the motion for reconsideration.

1. *See Beach v. Beach*, 72 App.D.C. 318, 114 F.2d 479 (1940).

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March 20, 1986

Mr. Leonard S. Wissow
Wissow, Odza & Steckiw
Stephen Girard Building
21 South 12th Street
Philadelphia, PA 19107

Dear Mr. Wissow:

Your letter arrived on the eve of my annual speaking tour, and I've only just now found time to answer it. Your legal realism is refreshing, but I wonder whether it answers all cases. For example, what about those in which the Supreme Court upholds in one era and strikes down in another? Or, better yet, the meaning of "unconstitutional" for a Supreme Court Justice before he issues an opinion on a case cannot be that the Supreme Court has held it unconstitutional. Yet they surely do ask whether what is before them is constitutional.

We are very pleased to have the copies of the documents in the Beckwith v. Beckwith case, as all we had heretofore was a brief newspaper account. Many thanks for thinking of us.

I will have your letter in mind as I write my next book: Lincoln and the Constitution: The Fate of Civil Liberties in Times of Total War.

Sincerely yours,

Mark E. Neely, Jr.